# 83-1103

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IN THE

## Supreme Court of the United States

OCTOBER TERM, 1983

PATRICK H. BERRY,
*Plaintiff-Respondent,*

vs.

AMERICAN COMMERCIAL BARGE LINES, a corporation, JEFF BOAT, INC. and LOUISIANA DOCK BOAT COMPANY, INC.
*Defendants-Petitioners.*

# PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT FOR THE FIFTH JUDICIAL DISTRICT OF ILLINOIS

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## QUESTIONS PRESENTED FOR REVIEW

I. Whether The Plaintiff, Patrick Berry, Was By Statutory Definition A Longshoreman As A Matter Of Law, And Hence Not A Seaman Or Master Or Member Of A Crew As A Matter Of Law.

II. Whether The Trial Court Erred In Giving Plaintiff's Instruction No. 21 Which Defined A Master Or Member Of A Crew.

## PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

PARENT COMPANIES: American Commercial Lines, Inc. is the parent company of the petitioners. Until July, 1983 Texas Gas Corporation was the parent corporation. However, in July, 1983 American Commercial Lines, Inc. was put in an independent trust with subsidiaries.

SUBSIDIARIES AND AFFILIATES: American Commercial Barge Lines Company, Jeffboat Incorporated and Louisiana Dock Company, Inc. are affiliates of the following:

Amcom, Inc., Commercial Barge Line Company, Inland Tugs Company, Mac Towing, Inc., Waterway Communications Systems, Inc., Mineral Properties, Inc., Combarco Industrial Limitada, American Commercial Terminals, Inc., Inland Terminals, Inc., American Freight Systems, Inc., All-American Redevelopments Corporation, Midwest Coast Transport, Inc., Atlantic Transport Service, Inc., Transport Brokerage, Inc., M.C.T. Services, Inc., Sioux Falls Service Center, Inc., Bauer Dredging Company, Inc., American Commercial Credit Corporation and American Commercial Leasing Company, Inc.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented For Review | i |
| Parent Corporations, Subsidiaries And Affiliates | ii |
| Table Of Contents | iii |
| Table Of Authorities | iv |
| Citation Of Case Below | 1 |
| Jurisdictional Statement | 1 |
| Statutes Involved | 2 |
| Statement Of The Case | 4 |
| Reasons For Granting The Writ | 6 |
| I. Whether The Plaintiff, Patrick Berry, Was By Statutory Definition A Longshoreman As A Matter Of Law, And Hence Not A Seaman Or Master Or Member Of A Crew As A Matter Of Law. | 6 |
| II. Whether The Trial Court Erred In Giving Plaintiff's Instruction No. 21 Which Defined A Master Or Member Of A Crew. | 14 |
| Conclusion | 17 |


## APPENDIX


| | |
|---|---|
| Appendix A | A-1 |
| Illinois Supreme Court Order | |
| Appendix B | A-2 |
| Appellate Court Opinion | |
| Appendix C | A-35 |
| Photo Of Shipyard | |

## TABLE OF AUTHORITIES


| | Page |
|---|---|
| Berry v. American Commercial Barge Lines, 114 Ill. App.3d 354, 71 Ill. Dec. 1, 450 N.E. 2d 436 (Ill. App. 5th Dist. 1983) | 1,6 |
| Bloomer v. Liberty Mutual, 445 U.S. 74, 100 S.Ct. 925, 63 L.Ed. 2d 215 (1980) | 7 |
| Buna v. Pacific Far East Line, Inc., 441 F. Supp. 1360 (N.D. Cal., 1977) | 11,15 |
| Cox v. Otis Engineering Corp., 474 F.2d 613 (5th Cir. 1973) | 11,15 |
| Davis v. Hill Engineering, Inc., 549 F.2d 314 (5th Cir. 1977) | 11 |
| Director v. Perini, 103 S.Ct. 634 (1983) | 7,9 |
| Guidry v. South Louisiana Contractors, Inc., 614 F.2d 447 (1980) | 10 |
| Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed. 2d 320 (1977) | 7 |
| Norton v. Warner Company, 321 U.S. 565, 64 S.Ct. 747, 88 L.Ed. 931 (1944) | 9,10 |
| Pfeiffer Company, Inc. v. Ford, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed. 2d 225 (1979) | 7,8,12 |
| Richardson v. Norfolk Shipbuilding and Drydock Corp. 479 F.Supp. 259 (E.D. Va., 1979) | 11 |
| Salgado v. M. J. Rudolph Corp., 514 F.2d 750 (2nd Cir. 1975) | 11,15 |
| South Chicago Dock Company v. Bassett, 309 U.S. 251, 60 S.Ct. 374, 87 L.Ed. 535 (1940) | 10 |

Sun Ship, Inc. v. Commonwealth of Pennsylvania, 447 U.S. 715, 100 S.Ct. 2432, 65 L.Ed. 2d 458 (1980) .. 8

Whittington v. Sewer Construction Co., 541 F.2d 427 (4th Cir. 1976) ..... 11,15

(1972) U.S. Code Cong. and Admin. News 4703-04 H.R.Rep. No. 1441, 92nd Congress, 2d Sess. 6.... 13

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## PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT FOR THE FIFTH JUDICIAL DISTRICT OF ILLINOIS

### CITATION OF CASE BELOW

*Patrick H. Berry* v. *American Commercial Barge Lines, A Corporation, Jeffboat, Inc. and Louisiana Dock Company, Inc.*, 114 Ill.App.3d 354, 71 Ill. Dec. 1, 450 N.E. 2d 436 (Ill. App. 5th Dist. 1983).

### JURISDICTION

Judgment in the amount of $250,000 was entered on August 4, 1981 in the Circuit Court for the Third Judicial Circuit for Illinois. An appeal was taken to the Appellate Court of Illinois for the Fifth District and the judgment was affirmed on May 27, 1983. A Petition for Leave to Appeal to the Illinois Supreme Court was filed. On October 4, 1983 the Illinois Supreme Court

denied the petition for Leave to Appeal and it is from that final order that the petitioners seek relief in this Court.

Jurisdiction to review the judgment is conferred by 28 U.S.C. §1257 because the primary issues involved in this appeal involve the State Court's interpretation of 46 U.S.C. 688, commonly referred to as the Jones Act and 33 U.S.C. 901, et seq., known as the Longshoremen's and Harbor Workers' Compensation Act.

## STATUTES INVOLVED

*Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., §901 et seq.*

**33 U.S.C.** §902

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, drydock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

**33 U.S.C.** §903 Coverage

(a) Compensation shall be payable under the Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable

waters of the United States (including any adjoining pier, wharf, drydock, terminal, building way, marine railway, or other adjoining area customarily used by an employee in loading, unloading, repairing, or building a vessel). No compensation shall be payable in respect of the disability or death of -

(1) A master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

**33 U.S.C.** §905 Exclusiveness of liability

(a) The liability of an employer prescribed in section 4 [33 USCS §904] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

**Jones Act**

**46 U.S.C. §688** Recovery for injury to or death of seaman.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for

damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the commonlaw right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

## STATEMENT OF THE CASE

Plaintiff Patrick Berry was employed by Louisiana Dock Boat Company, Inc. and affiliate of America Commercial Barge Lines, (R. 309-310) as a first class fitter (R. 335) at a shipyard repair facility located on the Mississippi River at the foot of Plum Street in Alton, Illinois. The facility consisted of an office, machine and mechanical barges, as well as two drydocks. The employees got to work from the shore through the use of a walkway over water. Many of the barges, including the office barges, were permanently affixed to the shore (R. 21-22). None of the drydock barges had any motive power. The drydocks were attached to shore with large steel arms and cables (R. 41-42). An aerial photograph of the facility is attached in the appendix.

The drydock, on which the plaintiff performed repair work on vessels, including the R. W. Naye, would lift the vessels out of the water enabling the shipyard workers to work beneath the ship (R.22-23, 89-90). At the facility there could be a maximum of 25 vessels in the drydock area in need of repair as well as 10 to 20 vessels nearby awaiting repair (R. 70, Volume 3). These included vessels which were not owned by the defendant, American Commerical Barge Lines (R. 124).

On November 29, 1973 the plaintiff twisted his leg while attempting to replace a steel patch on a barge being repaired on a daughter dock at the shipyard facility (R. 336, 338). On December 10, 1973 he reinjured his knee while repairing a shaft on the R.W. Naye, a vessel being repaired while it was up on the daughter dock (R. 340, 57).

The plaintiff alleged that he was a seaman which would entitle him to recover under the Jones Act, 46 U.S.C. § 688, et seq.

At trial the defendants moved for a directed verdict at the end of all the evidence on the grounds that the plaintiff was not a member of the crew under the Jones Act, and, further, that the plaintiff's exclusive remedy was under the Longshoremen's and Harbor Workers' Act 33 USC §905(a) (R. 415-427). The Court denied the motion for directed verdict (R. 426). A post trial motion was filed on September 9, 1981, and again the defendants raised the issue that the plaintiff was not a Jones Act seaman and that his exclusive remedy was under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 905(a) (C. 453). On December 1, 1981 the Court denied the post trial motion. (C-481).

The appellant's brief raised the issue that the trial court erred in failing to direct a verdict for the defendants on the issue of the plaintiff's status as a seaman, and the appellant's brief argued that the plaintiff was not a seaman or member of the crew, but was a longshoreman whose exclusive remedy was under the Longshoremen's and Harbor Workers' Act, 33 U.S.C. 901, et seq.

## REASONS FOR GRANTING THE WRIT

I. **Whether The Plaintiff, Patrick Berry, Was By Statutory Definition A Longshoreman As A Matter Of Law, And Hence Not A Seaman Or Master Or Member Of A Crew As A Matter Of Law.**

In *Berry* v. *American Commercial Barge Lines,* 114 Ill.App.3d 354, 71 Ill. Dec. 1, 450 N.E. 2d 436 (Ill. App. 5th Dist. 1983), the Appellate Court for the Fifth District of Illinois expanded the status of member of a crew to include longshoremen and more particularly longshoremen engaged in ship repair. The Longshoremen's and Harbor Workers' Act, 33 U.S.C. §901, et seq., defines an employee as any person including any longshoreman engaged in ship repair but an employee does not include a master or member of a crew of any vessel. 33 U.S.C. §902 (3). The Appellate Court of Illinois has decided an important question of federal law in a way in conflict with applicable decision of this Court and in conflict with the statutory scheme for protecting those engaged in maritime employment. As such this Court should settle this important question of federal law.

The Illinois court has allowed a longshoreman to sue his employer under 46 U.S.C. §688, known as the Jones Act, despite the mutually exclusive nature of the two acts. As a result of the Appellate Court opinion in this case, the petitioners' attorney has been contacted by a workers' compensation attorney who represents what has, until now, been considered an employer under the Longshoremen's and Harbor Workers' Compensation Act. The workers' compensation attorney advises that in the event that the opinion of the Illinois court is to be the law of Illinois, the attorney will advise his clients that they should deny benefits under the Longshoremen's and Harbor Workers' Compensation Act to all employees in respondent Patrick Berry's situation. The rationale, of course, is that if such employees are going to claim to be members of a crew of a vessel, then they are to be excluded from benefits under 33 U.S.C. 903.

This Court has addressed the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act and has defined the status and situs requirements under the Act. One of the reasons for the expanded definition of longshoreman is to enable both workers and employers to predict with reasonable assurance who is protected by the 1972 Act. *Pfeiffer Company, Inc.* v. *Ford,* 444 U.S. 69, 100 S. Ct. 328, 62 L. Ed. 2d 225 (1979). Another reason for consistent definitions is to avoid fortuitous results. *Director* v. *Perini,* 103 S.Ct. 634 (1983) n. 29. A third reason for defining those within the scope of the Act is to avoid the preamendment results of having employees walk in and out of coverage. *Director* v. *Perini, supra.*

The Appellate Court decision in this case serves none of the purposes enumerated by this Court's decisions and will create uncertainty and fortuitous results.

One of the purposes of the 1972 Amendments was to improve the benefits schedule which was deemed inadequate by all parties. In exchange for an increase in benefits the employer was guaranteed that a payment under the Longshoremen's and harbor Workers' Act was the employees exclusive remedy and the employer would not be subject to additional lawsuits because of the injury. In addition, the elimination of the lawsuits increased the fund available for compensation. *Northeast Marine Terminal Co.* v. *Caputo,* 432 U.S. 249, 97 S. Ct. 2348, 53 L. Ed. 2d 320 (1977). As an indication of the importance of preserving and increasing the fund this Court has even denied attorneys' fees and expenses and has required full reimbursement to the stevedore for amounts paid under the Act. *Bloomer* v. *Liberty Mutual,* 445 U.S.74, 100 S. Ct. 925, 63 L. Ed. 2d 215 (1980).

As a result of the 1972 Amendments this Court has expanded the protection of the Act. In *Northeast Marine Terminal Co.* v. *Caputo, Supra.,* this Court stated: "the language of the 1972 Amendments is broad and suggests that we should take an expansive view of the extended coverage". 432 US 249 at 268. As additional indications of the expansion of coverage see also

*Director* v. *Perini, Supra.*, and *Sun Ship, Inc.* v. *Commonwealth of Pennsylvania*, 447 U.S. 715, 100 S. Ct. 2432, 65 L.Ed. 2d 458 (1980) and *Pfeiffer Company, Inc.* v. *Ford, Supra.*

The Illinois court's expansion of the class of workers entitled to claim that they are "masters or member of any vessel" is in conflict with this Court's expansion of the mutually exclusive class of longshoremen.

**Why Respondent Is A Longshoreman.**

The sections of the Longshoremen's and Harbor Workers' Act relevant to this case are the following. The italics indicates the material added in 1972.

§ 903 "Coverage

"Compensation shall be payable under the Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (*including any adjoining pier, wharf, drydock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)* ..." 33 U.S.C. § 903(a).

§902 Definitions

(3) "The term 'employee" *means any person engaged in maritime employment including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term* does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." 33 U.S.C. §902(3).

(4) "The term 'employer' means an employer any of whose employees are employed in maritime employment, in

> whole or in part, upon the navigable waters of the United States *(including any adjoining pier, wharf, drydock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).* 33 U.S.C. § 902(4).

Prior to the 1972 Amendments, the Act contemplated that those engaged in repairing ships would be covered under the Act. In *Norton* v. *Warner Company,* 321 U.S. 565, 64 S.Ct. 747, 88 L.Ed. 931 (1944) this Court stated "and we are told by the Senate report, as already noted, that the purpose of the legislation was to provide compensation for those who 'are mainly employed in loading, unloading, refitting, and repairing ships.' " at 572. However, the 1972 Amendments specifically enumerated the categories of longshoremen, including repairmen, covered by the Act. In *Director* v. *Perini, supra.,* this Court discussed the legislative history concerning the enumerations of categories and concluded:

> "although the legislative history surrounding the addition of the status requirement is not as clear as that concerning the reasons for the extended situs, it is clear that with the definition of 'navigable waters' expanded by the 1972 Amendments to include such a large geographical area, it became necessary to describe affirmatively the class of workers Congress desired to compensate." At 647-648.

In a footnote the Court continued ...

> "we note that our cases to date have focused on these explicit categories because the legislative history indicates that Congress intended to extend landward coverage to those specifically included occupations." n. 27.

The respondent, Patrick Berry, was ship repairman working for an employer on a drydock used for repairing a vessel and was injured on said drydock which was customarily used by him

for repairing vessels. The respondent clearly fits into the definitions under the Longshoremen's and Harbor Workers' Compensation Act. However, he is claiming to fall within the exception of being a member of a crew of any vessel. The reason for the exception is clear. Members of a crew "preferred, however, to remain outside the compensation provisions and, thus, to retain the advantages of their election under the Jones Act...." *South Chicago Dock Company* v. *Bassett,* 309 U.S. 251, 60 S.Ct. 374, 87 L.Ed. 535 (1940) at 257. In *Norton* v. *Warner Company, supra.,* the Court again discussed the exception as follows: "the effort to bring a master and member of a crew of a vessel under the Act was successfully opposed by the representatives of maritime employees (cites omitted) and the maritime unions which appeared as a Amici Curiae in the present case emphasized the importance of that exception. The liability of an employer under the Act is exclusive." At page 570.

The important question is does a longshoreman transmute into a seaman or member of a crew or are they two distinct categories or status from the beginning. Since the concepts are mutually exclusive it is assumed that they are different ab initio.

The member of a crew who comes landward and performs the types of employment described in the Longshoremen's and Harborworkers' Compensation Act does not lose his status as a seaman or member of a crew. The Jones Act, "however, says nothing about the place where the injury occurs. Therefore, once it is established that a worker is a seaman, the Jones Act permits him to recover from his employer even for injuries received while he is on shore." *Guidry* v. *South Louisiana Contractors, Inc.,* 614 F.2d 447 (1980) at 453. A member of a crew does not become a longshoreman and for this reason the Longshoremen's and Harbor Workers' Compensation Act excluded from its definition members of a crew to avoid any confusion regarding their status.

It is something quite different to allow a longshoreman to claim member of a crew status in every instance especially where

the employee clearly falls within the definition of longshoreman at all times for both the situs and status tests enumerated by this Court. An employee cannot be a longshoreman and claim he is not a longshoreman because he is a member of a crew unless he was a member of a crew initially.

**Why Respondent Is Not A Member Of A Crew**

The respondent did not have a more or less permanent connection to a fleet of vessels which is one of the requirements for seamanship status under the generally accepted definition. *Salgado* v. *M. J. Rudolph Corp.*, 514 F.2d 750 (2nd Cir. 1975), *Whittington* v. *Sewer Construction Co.*, 541 F.2d 427 (4th Cir. 1976), *Cox* v. *Otis Engineering Corp.*, 474 F.2d 613 (5th Cir. 1973), *Buna* v. *Pacific Far East Line, Inc.*, 441 F.Supp. 1360 (N.D. Cal., 1977), *Richardson* v. *Norfolk Shipbuilding and Drydock Corp.*, 479 F.Supp. 259 (E.D. Va., 1979). The primary reason that the respondent fails the permanency test is the fact that he was a landbased worker. In *Davis* v. *Hill Engineering, Inc.*, 549 F.2d 314 (5th Cir. 1977) the Court discussed this deficiency in respondent's claim of seaman's status:

> In contrast, the cases in which this Court has found the permanency requirement a fatal stumbling block have largely involved land based workers providing shore services to docked vessels. In *Thibodeaux* v. *J. Ray McDermott & Co.*, 5 Cir. 1960, 276 F.2d 42, the Court reasoned that the decedent has a transitory relation to the barge on which he was injured where he was a regular shore worker who ate, slept, and lived at home, was not assigned to any particular vessel, and had worked only four days loading and securing deck cargo on unmanned barges. Similarly, this Court sustained a directed verdict for the defendant on the seaman issue in *Burns* v. *Anchor-Wate Co.*, 5 Cir. 1972, 469 F.2d 730, because the Plaintiff, a talleyman at a pipe-coating yard, who never worked more than two or three hours aboard any particular barge and never slept or

> ate aboard the barges or towing vessels, was not permanently assigned to the barge on which he was injured. (Cites omitted) At page 327-328.

We have already seen that this Court is concerned with the fact that before the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act employees would often walk in and out of coverage in a single day. If the respondent in this case was truly a seaman and assigned to a vessel or fleet of vessels, neither respondent nor his co-workers would be expected to walk in and out of seamanship status every day. As the photograph in the appendix shows there are many areas at the repair facility for employees to work where they are not on vessels in the drydock for repairs. These employees do welding work in the shop, and, although they do substantially similar work as that done by respondent, they could not claim seaman status because they are not assigned to work on any of the vessels.

Many of the vessels repaired at the facility were not in the petitioners' fleet of vessels. If the respondent is randomly assigned to spend a significant amount of his time working on petitioners' fleet he would claim to be a member of the crew under the Appellate Court's holding. If a co-worker was randomly assigned to repair vessels not owned by petitioners and not part of petitioners' fleet, but rather owned by others and repaired by petitioners he could not claim to be a member of a crew even though he did identical work to that done by respondent. This is but one difficulty with the Appellate Court's opinion which extends the worker's right to claim member of a crew status as far as has been found in any case.

In *Pfeiffer* v. *Ford,* 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed. 2d 225 (1979), this Court traced the type of work that an employee engaged to unload a vessel would do from the time the cargo was in the hold of the vessel until it was in a warehouse. For purposes of the status requirement of the Longshoremen's and Harbor Workers' Compensation Act this Court held that it

made no difference whether the employee was in the hold of the vessel or in the warehouse so long as the employee's job was an integral part of the unloading process. By analogy in the instant case we should look at whether the respondent was an integral part of the repair process. In *Pfeiffer* this Court was going from seaward to landward to include the landward employee under the Longshoremen's and Harbor Workers' Compensation Act. In this case the petitioner asks the Court to look seaward. Other workers at the repair facility in this case would not be able to claim to be a member of the crew unless they were assigned to work on the vessels in drydock. The respondent may have been assigned to work one step seaward of the other employees. However, the respondent was still an integral part of the repair process and so was afforded the protection of the Longshoremen's and Harbor Workers' Compensation Act.

The respondent in this case was a land based worker repairing vessels in drydock. The 1972 Amendments eliminated the unseaworthiness remedy for longshoremen and replaced it with negligence concepts. The committee rationale for doing so sheds light on why the respondent is not a member of a crew in this instance.

> "In reaching this conclusion the committee has noted that the seaworthiness concept was developed by the courts to protect seaman from the extreme hazards incident to their employment which frequently requires long sea voyages and duties of obedience to orders not generally required of other workers. The rationale which justified holding the vessel absolutely liable to seaman if the vessel is unseaworthy does not apply with equal force to longshoreman and other non-seaman working on-board a vessel while it is in port." (1972) U.S. Code Cong. and Admin News 4703-04 H.R.Rep.No. 1441, 92nd Congress, 2d Sess. 6.

Congress considered the type of work being done by Patrick Berry and did not consider it to be the hazardous work done by seaman. It is a further indication that Berry is not a seaman.

The Appellate Court opinion transmutes a longshoreman into a seaman and if the Appellate Court decision is followed most, if not all, workers who were previously thought to be covered only under the Longshoremen's and Harbor Workers' Compensation Act will file suit under the Jones Act. The Appellate Court decision defies Congressional intent in enacting these two statutes and is the most liberal decision found by petitioners on the issue of seaman status.

II. **Whether The Trial Court Erred In Giving Plaintiff's Instruction No. 21 Which Defined A Master Or Member Of A Crew.**

Over the defendant's objection, Instruction No. 21 was submitted to the jury, as follows:

> The proposition of whether the plaintiff was a member of a crew of a vessel at the time of the accident is a question of fact which you must determine, just as you determine all questions of fact in the case.
>
> You may find that the plaintiff was a member of a crew of a vessel if you find:
>
> (a). that the plaintiff's employment related to a vessel having specific function (or mission); and,
>
> (b). that the plaintiff had a part in the operations of the vessel, whether it be related to the vessel's transportation or to the performance of its function (or mission).
>
> It is not essential that the plaintiff be assigned to any particular vessel. He may have duties which require him to serve on numerous vessels, and you may still find that he is a member of the crew of the particular vessel involved in this case.
>
> One whose employment takes him onto a vessel may be found to be a member of the crew, even though his stay

aboard is expected to last only for a very short period. You may find that the defendant is a member of the crew of a vessel even though the vessel has not moved on the water at any time during the plaintiff's employment, and even though there are no plans to move it at any time in the foreseeable future.

There must, however, be more than an irregular connection between the plaintiff and some vessel in order that he may be found to be a member of the crew. If the plaintiff were a mere passenger being transported to a place of work which is not connected with a vessel he is not a member of the crew of the vessel in which he is being transported, even though his employer owned that vessel and was transporting the plaintiff for its own purposes." (C 167-168).

This instruction was totally inaccurate, argumentative and misleading. As stated in Section I, supra, the courts have developed a three-part test to determine whether an individual is a seaman (or a member of a crew), for the purposes of the Jones Act. This test was stated in *Cox* v. *Otis Engineering Corp.*, 472 F.2d 999 (5th Cir. 1973), as follows:

1) The vessel on which the claimant is employed must be in navigation.

2) There must be a more or less permanent connection with the vessel.

3) The claimant must be aboard primarily in aid in navigation.

See also *Salgado* v. *M.J. Rudolph Corp.*, 514 F.2d 750 (2nd Cir. 1975), *Whittington* v. *Sewer Construction Co.*, 541 F.2d 427 (4th Cir. 1976), *Buna* v. *Pacific Far East Line, Inc.*, 441 F.Supp. 1360 (N.D. Cal., 1977), The defendant offered this test of seaman's status as Instruction No. 12, but it was refused by the trial court.

The second paragraph of the plaintiff's instruction purports to be the applicable guidelines for the jury to determine whether the plaintiff was a seaman (member of a crew). But, this paragraph was nothing more than an attempt to restate prong three of the above test. Nowhere are the first two prongs of the test even remotely referred to in the instruction.

Yet, the question whether the plaintiff was "more or less permanently assigned to the vessel" in this case was crucial and at best a close question of fact. In fact, the third and fourth paragraphs of the instruction mislead the jury into thinking that the plaintiff need not be permanently connected with a vessel. While the first sentence of the fifth paragraph attempts to qualify the earlier paragraphs, the second sentence of that paragraph totally destroys its impact by implying that only passengers will be deemed not to be a member of a crew. This reference to a passenger heightened the prejudice of the instruction, for there was no evidence on the record, nor was it ever implied by the defendants that the plaintiff was a passenger.

This instruction is clearly argumentative, for it has the effect of directing a verdict on the issue of whether the plaintiff was a member of a crew in favor of the plaintiff. The jury was totally mislead to believe the plaintiff, to obtain seaman's status, need only be associated with some vessel, for some period of time, as opposed to having a permanent connection with a vessel, unless they found him to be a passenger, which was totally unlikely since there was not a shred of testimony indicating that he was a passenger. As such, the court erred in giving Instruction No. 21 for it had not basis in the law and because it was misleading and argumentative.

## CONCLUSION

The petitioners contend that the plaintiff/respondent and all other workers similarly employed are covered under the Longshoremen and Harbor Workers' Compensation Act and are not a seamen as a matter of law and, hence the Trial Court and Appellate Court and Illinois Supreme Court erred in not so holding. We petition for certiorari to seek a reversal of the judgment or a new trial with proper instructions on the definition of member of a crew.

Respectfully submitted,

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Attorney for the Defendants-
Petitioners

# APPENDIX

## APPENDIX A

Illinois Supreme Court
Juleann Hornyak, Clerk
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

October 4, 1983

Mr. Eric C. Young
Dunham, Boman & Leskera
520 First Illinois Bank Bldg.
East St. Louis, IL 58319

No. 58319 - Patrick H. Berry, respondent, vs. American Commercial Barge Lines, etc., et al., etc., petitioners. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Juleann Hornyak
Clerk of the Supreme Court

P.S. The Mandate of this Court will issue to the Appellate Court on October 26, 1983.

## APPENDIX B

Berry v. American Commercial Barge Lines

Cite as 71 Ill.Dec. 1, 450 N.E.2d 436 (Ill.App. 5 Dist. 1983)

450 N.E.2d 436

114 Ill.App.3d 354

450 N.E.2d 436

Patrick H. Berry, Plaintiff-Appellee,
Cross-Appellant,

v.

American Commercial Barge
Lines, a corporation, Jeff Boat, Inc.,
and Louisiana Dock Company, Inc.,
Defendants-Appellants, Cross-Appellees.

No. 82-4.

Appellate Court of Illinois,
Fifth District.

May 27, 1983.

Shipfitter employed by subsidiary corporation brought action under the Jones Act against the subsidiary and its parent corporation for injuries sustained while repairing a vessel and barge moored to a floating drydock. The Circuit Court, Madison County, Horace Calvo, J., entered judgment on verdict for shipfitter, and subsidiary and parent corporation appealed. The Appellate Court, Welch, J., held that whether shipfitter employed by subsidiary corporation was a "seaman" for purposes of the Jones Act at time he sustained injuries while repairing a vessel and barge moored to a floating drydock because vessel and barge were in navigation when shipfitter was injured, because shipfitter was a repair or maintenance worker who was directly connected with keeping vessels in navigation or prepar-

ing them to retain navigational capacity, and because shipfitter had a more or less permanent connection with vessel or with a specific group or fleet of vessels which contained them was question for jury in resolving liability of subsidiary and its parent corporation.

Affirmed.

Kasserman, J., dissented and filed opinion.

**1. Seamen key 29(5.16)**

Question whether an individual is a seamen for purposes of the Jones Act depends upon the facts of the particular case and the activity in which he was engaged at the time of the injury and should be decided as a matter of law only when the underlying facts are undisputed and the record reveals no evidence from which reasonable persons might draw conflicting inferences. Jones Act, 46 U.S.C.A. § 688.

**2. Seamen key 29(5.16)**

An individual's status as a seaman for purposes of the Jones Act presents a jury question if the individual was injured upon a vessel in navigation, the individual was aboard that vessel primarily to aid in navigation, and the individual had a more or less permanent connection with the vessel or with a specific group or fleet of vessels. Jones Act, 46 U.S.C.A. § 688.

**3. Seamen key 29(5.3)**

Fact that shipfitter employed by subsidiary corporation repaired vessel and barge while they were moored to a floating drydock did not bar recovery against subsidiary and its parent corporation under the Jones Act if shipfitter met requirements of being a crew member of vessel and barge or a fleet which contained them. Jones Act, 46 U.S.C.A. § 688.

**4. Seamen key 2**

Presence of vessel and barge in floating drydock for repairs did not mean that they were not in navigation at time of shipfitter's injuries so as to preclude him from being a seaman under the Jones Act absent evidence that vessel and barge were removed from service for a season or other substantial period of time or were undergoing repairs of such a major character as to amount to a withdrawal from navigation. Jones Act, 46 U.S.C.A. § 688.

**5. Seaman key 2**

The phrase "primarily in aid of navigation," within rule for determining whether an individual is a seaman under the Jones Act, means that the duties of the individual must have contributed to the vessel's function or to the accomplishment of its mission. Jones Act, 46 U.S.C.A. § 688.

See publication Words and Phrases for other judicial constructions and definitions.

**6. Seamen key 2**

Although the throwing and securing of lines is normally a seamen's chore, one who occasionally engages in that task is not necessarily a seaman. Jones Act, 46 U.S.C.A. § 688.

**7. Seamen key 2**

A maintenance worker need not be assigned to work on operational vessels in order to satisfy permanency requirement of "seamen" test that an individual have a more or less permanent connection with vessels or with a specific group or fleet of vessels which contain them. Jones Act, 46 U.S.C.A. § 688.

**8. Seamen key 29(5.16)**

Whether shipfitter employed by subsidiary corporation was a "seamen" for purposes of the Jones Act at time he sustained in-

juries while repairing a vessel and barge moored to a floating drydock because vessel and barge were in navigation when shipfitter was injured, because shipfitter was a repair or maintenance worker who was directly connected with keeping vessels in navigation or preparing them to retain navigational capacity, and because shipfitter had a more or less permanent connection with vessels or with a specific group or fleet of vessels which contained them was question for jury in resolving liability of subsidiary and its parent corporation to shipfitter under the Jones Act. Jones Act, 46 U.S.C.A. § 688.

**9. Appeal and Error key 216(1)**

To save an objection to an instruction, it is incumbent upon a party to tender a proper instruction, otherwise that objection is waived.

**10. Appeal and Error key 216(3)**

Objection which was made by defendants to definition of term "vessel" in instruction tendered by plaintiff in action under the Jones Act for injuries sustained while repairing a vessel and barge moored to a floating drydock was waived where defedants did not offer their own definition of a vessel and did not offer a definitional instruction in their own brief. Jones Act, 46 U.S.C.A. § 688.

**11. Seamen key 29(5.17)**

Instruction which was offered by plaintiff in action under the Jones Act for injuries sustained while repairing a vessel and barge moored to a floating drydock and which authorized jury to find that plaintiff was a member of a crew of a vessel if his employment was related to a vessel having a specific function or mission and if plaintiff had a part in operation of vessel whether it was related to vessel's transportation or to performance of its function was not erroneous as failing to require jury to find that vessel upon which plaintiff was employed was in navigation and

that plaintiff had a more or less permanent connection with vessel. Jones Act, 46 U.S.C.A. § 688.

**12. Seamen key 29(5.17)**

An instruction containing the phrase "primarily in aid of navigation" without defining the phrase as requiring that the duties of a seaman for purposes of the Jones Act must have contributed to the vessel's function or to the accomplishment of its mission would be unduly restrictive. Jones Act, 46 U.S.C.A. § 688.

**13. Seamen key 29(5.17)**

While it would be more preferable to require a jury to find that a seaman for purposes of the Jones Act is more or less permanently attached to a vessel or group of vessels, the phrase "more than an irregular connection with some vessel" is not improper language in a Jones Act instruction. Jones Act, 46 U.S.C.A. § 688.

**14. Seamen key 29(5.17)**

Reference in instruction to a plaintiff as being a passenger being transported to a place of work did not dilute the requirement in a Jones Act case of the plaintiff's connection with a vessel and was mere surplusage. Jones Act, 46 U.S.C.A. § 688.

**15. Appeal and Error key 232(3)**

Defendants in Jones Act case, having failed to object to plaintiff's instruction on ground that it did not use word "employer," and having referred to themselves as "vessel owners," could not be heard to complain that plaintiff's instructions erroneously referred to defendants as vessel owners or operators rather than as employers and that liability could only attach to the employer-employee relationship under the Jones Act. Jones Act, 46 U.S.C.A. § 688.

**16. Appeal and Error key 231(9)**

A claim that plaintiff's instruction in Jones Act case was defective in failing to specify vessel to which plaintiff claimed permanent attachment was waived by failure of defendants to object to instruction in trial court on that ground. Jones Act, 46 U.S.C.A. § 688.

**17. Appeal and Error key 1067**
**Seamen key 29(5.17)**

Failure to give an otherwise applicable pattern instruction in Jones Act case on responsiblity of a corporation for the negligent act or omission of an officer, employee, or other agent of corporation was error, but since given instruction was neither partial, misleading, or argumentative and, in fact, presented identical proposition of law, error was not of a reversible nature. S.H.A. ch. 110A, ¶239(a); IPI 2d 50.11.

**18. Seamen key 29(5.17)**

Instructions on liability of third parties in Jones Act case was not, given relatively ambiguous status of ownership of vessels involved, erroneous on groud that there was no evidence that applied when a third party was to blame for injury in case. IPI 2d 3.01, 12.04, 15.01, 50.11.

**19. Appeal and Error key 302(1), 758.3(7)**

That plaintiff's counsel in Jones Act case allegedly exhibited a hostile tone toward a witness for defendants, made improper remarks directed toward defense counsel, and engaged in improper questioning and improper courtroom behavior was not a basis for granting a mistrial in case where defendants did not specify the remarks and questions they characterized as improper, but merely listed several pages of record, and were even less specific in their posttrial motion.

Dunham, Boman & Leskera, East St. Louis, for defendants-appellatns, cross-appellees; Howard Boman and Eric C. Young, East St. Louis, of counsel.

William E. Brandt, William E. Brandt & Associates, Granite City, and Goerge J. Moran, Sr., Callahan & Moran, Trenton, for plaintiff-appellee, cross-appellant.

WELCH, Justice:

Plaintiff Patrick Berry was employed as a first class shipfitter at facilities operated by subsidiaries of American Commercial Barge Lines (ACBL) on the Mississippi River at Alton Illinois. On November 29, 1973, he was working on an inclined metal surface known as a slope sheet on barge vessel S-127 which had been brought to ACBL's floating drydock for repairs. While assisting a welder in replacing a metal patch on tha tsurface, the plaintiff was temporarily blinded by the flash from the arc of the welder's rod when the welder accidently struck an arc in front of the plaintiff. He then lost his balance and attepted to descend the slope sheet so that he would not fall, but his foot became caught on a piece of metal called a scab, which is welded temporarily onto metal surfaces to give repair workers more secure footing. The plaintiff fell, injuring his left knee.

On December 10, 1973, the plaintiff again sustained injuries to that knee. He was assigned to do repair work in the port side shaft alley of the motor vessel R.W. Naye, which had also been brought to the floating drydock. As he was heating shaft couplings with a rosebud torch, he slipped on grease which had accumulated on the floor of the shaft alley compartment.

The plaintiff brought suit in the circuit court of Madison County against ACBL and two of its subsidiaries, Jeff Boat, Inc. and Louisiana Dock Boat Co., Inc. (La. Dock) to recover for his injuries. This action was based, *inter alia*, on general principles of negligence and maritime law and on the Jones Act (46 U.S.C. sec. 688) The case was submitted to the jury against

ACBL and La. Dock under the Jones Act counts, and the jury awarded the plaintiff $250,000 in damages against both defendants. Judgment was entered upon that verdict. Defendants ACBL and La. Dock appeal from that judgment against them, and the plaintiff has brought a cross appeal in which he requests that, if it is determined that he is not covered by the Jones Act as a matter of law, then the court's order dismissing his maritime and negligence counts should be reversed.

The defendants present three assignments of error: (1) The trial court should have directed verdicts in their favor because the evidence introduced at trial fails to show that the plaintiff was a "seaman." (2) The court erred in giving certain instructions proffered by the plaintiff, and (3) the court should have granted defendants' motion for a mistrial, based upon the conduct of plaintiff's counsel in examining a witness called by him under Section 60 of the Civil Practice Act (Ill.Rev.Stat.1979, ch. 110, par. 60, now par. 2-1102, Code of Civil Procedure).

The first argument made by the defendants presents another variation on the Jones Act "riddle," as characterized by the Fifth Circuit (*Ardoin* v. *J. Ray McDermott and Co.* (5th Cir.1981), 641 F.2d 277, *reh. den.*, 646 F.2d 566, *app. after remand* (1982), 684 F.2d 335; *Offshore Co.* v. *Robison* (5th Cir. 1959), 266 F.2d 769), namely, "When is a maritime worker a seaman?" More accurately, this case asks, "When is a jury question presented concerning whether a shipfitter injured while working on vessels on a floating drydock is a seaman?" The solution to this "riddle" requires more "clues," in the form of the facts of this case.

The facilities at which the plaintiff was employed were located on the Mississippi River at the foot of Plum Street in Alton, Illinois. They consisted of office, machine and mechanical barges, as well as two floating drydocks. The barges were permanently secured to pylons by cables, and one would obtain access to the barges through a walkway from shore. The record indicates that none of the facilities at Alton were located ashore.

Although both floating drydocks could be moved from place to place, neither had any motive power, and they would have to be transported by a motor vessel. The drydocks were attached to large steel arms by cables. A vessel needing repair would move close to a drydock, or, if it were not self-propelled, it would be brought to the drydock, generally by the ACBL motor vessel Little Giant. The drydock would then be partially submerged, allowing the vessel to enter, and raised again, the vessel along with it.

The plaintiff was first hired by ACBL as a laborer and deckhand on the Little Giant. In that capacity, he was required to use lines and wires to attach the Little Giant to other vessels. Eventually, the plaintiff was promoted to second class fitter, and then again to first class fitter. As a fitter, he worked with torches and sledge hammers to fit steel into place on vessels in need of repair. However, he also continued to handle lines and wires, even when he worked on the drydock, because the vessels brought to the drydock had to be secured. The plaintiff recalled that he usually operated lines adn wires about twice a day. Gary Bidwell, who was with the plaintiff on the R.W. Naye on December 10, 1973, and who had been employed by ACBL, always as a first class welder, testified that when he was assigned to work on a drydock, he would work with lines as the drydock was raised or lowered.

The plaintiff did not sleep on board any vessel or other facility. He lived ashore, reported for work as scheduled and received assignments to repair whatever motor vessels or barge vessels were in need of repair. These assignments could require him to work on a vessel in the drydock or on a vessel afloat in the Mississippi. He could perform repairs on a vessel belonging to ACBL or one of its subsidiaries, or on a vessel belonging to a concern unconnected with ACBL. The La. Dock and Jeff Boat Companies "provide the bulk of service" for ACBL and its barge companies, according to ACBL's vice-president and general counsel, but their facilities are operated independently

and thus do repair and fabrication work on non-ACBL vessels. The R.W. Naye and the barge vessel S-127, on both of which the plaintiff was injured, were owned and operated by ACBL or subsidiaries. At the time of his injuries, the plaintiff was employed by La. Dock, being the ACBL subsidiary concerned with ship repair, and is paychecks reflected that ACBL acted as the paying agent for La. Dock.

**[1]** Recovery under the 1920 amendment to the Merchant Marine Act, commonly known as the Jones Act, is limited to "any seaman" suffering personal injury in the course of his employment or to the personal representative of any seaman who dies as a result of such injury. (46 U.S.C. sec. 688). The provisions of the Act itself do not define the term "seaman," although there are many decisions which purport to do so. Because the question of whether an individual is a seaman for purposes of the Jones Act depends upon the facts of the particular case and the activity in which he was engaged at the time of the injury (*Desper* v. *Starved Rock Ferry Co.* (1952), 342 U.S. 187, 72 S.Ct. 216, 96 L.Ed. 205, *reh. den.*, 342 U.S. 934, 72 S.Ct. 374, 96 L.Ed. 695), it is only when the underlying facts are undisputed and the record reveals no evidence from which reasonable persons might draw conflicting inferences, that this question should be decided as a matter of law. (*Ardoin* v. *J. Ray McDermott and Co.; Burns* v. *Anchor-Wate Co.* (5th Cir. 1972), 469 F.2d 730).

**[2]** In deciding whether a plaintiff's status as a seaman presented a jury question, the authorities under the Jones Act have been virtually unanimous in applying the following three-part test to various sets of facts: (1) that the plaintiff was injured upon a vessel in navigation, (2) that the plaintiff was aboard that vessel primarily to aid in navigation, and (3) that the plaintiff had a more or less permanent connection with that vessel or with a specific group or fleet of vessels. (*Abshire* v. *Seacoast Products, Inc.* (5th Cir. 1982), 668 F.2d 832; *Baker* v. *Pacific Far East Lines, Inc.* (N.D.Cal. 1978), 451 F.Supp. 84; *Griffith*

v. *Wheeling Pittsburgh Steel Corp. (3rd Cir. 1975), 521 F.2d 31, cert. den.* (1976), 423 U.S. 1054, 96 S.Ct. 785, 46 L.Ed.2d 643; *Offshore Co.* v. *Robison*). This test rests upon several unexplained definitions such as the terms "navigation" and "aid to navigation." But, in this case, it is the term "vessel" which the defendants claim presents a threshold issue, resolution of which in their favor as a matter of law would obviate applying the three part test.

The plaintiff contends that the defendants presented their case in the trial court under the theory that the R.W. Naye, the barge S-127 and the floating drydock could be considered "vessels" by the jury and thus they should be prevented from denying their status as vessels to this court. However, in moving for a directed verdict, the defendants raised the issue of whether the plaintiff was not a seaman as a matter of law, and the defendants are correct that the status of the drydock as a vessel is an integral part of that question. Moreover, the defendants' written post-trial motion specifically argued that there was no evidence to prove the existence of any vessel in navigation. Thus, the theory that the floating drydock is not a vessel as a matter of law is not a contention which was never presented to the trial court.

Essentially, the defendants insist that the floating drydock upon which the plaintiff worked was not a vessel as a matter of law, and therefore, the plaintiff could not be a seaman. The defendants accurately note that the Federal courts have developed the rule that a floating drydock is not a vessel as a matter of law when it is moored and in use as a drydock. (*Nevel* v. *Todd Shipyards Corp. (N.D.Cal.) 1978 Am. Maritime Cases 2230; Keller* v. *Dravo Corp.* (5th Cir. 1971), 441 F.2d 1239, *cert. den.* (1972), 404 U.S. 1017, 92 S.Ct. 679, 30 L.Ed.2d 665; *Chahoc* v. *Hunt Shipyard* (5th Cir. 1970), 431 F.2d 576, *cert. den.* (1971), 401 U.S. 982, 91 S.Ct. 1198, 28 L.Ed.2d 333; *Atkins* v. *Greenville Shipbuilding Corp.* (5th Cir. 1969), 411 F.2d 279, *cert. den.* 396 U.S. 846, 90 S.Ct. 105, 24 L.Ed.2d 96;

*compare U.S.* v. *Moran Towing and Transportation Co.* (4th Cir. 1967), 374 F.2d 656, *vacated on other grounds sub nom U.S.* v. *Bethlehem Steel Co.* (1968), 389 U.S. 575, 88 S.Ct. 689, 19 L.Ed.2d 775 (floating drydock under tow in navigable waters held to be a vessel); *Bernardo* v. *Bethlehem Steel Co.* (2nd Cir. 1963), 314 F.2d 604 (Judgment entered on jury verdict in favor of defendant and affirmed on appeal, thus status of floating drydock as not a vessel as a matter of law, not presented); *contra, Rogosich* v. *Union Dry Dock and Repair Co.* (3rd Cir. 1933), 67 F.2d 377). But this proposition is fatal to the plaintiff's claim only if the plaintiff does not contend to have been attached to any other vessel or fleet of vessels. For example, in *Nevel, Chahoc* and *Atkins,* it does not appear that the drydock workers maintained that they were members of the crew of the vessels they were repairing or of a fleet contining those vessels. In *Keller,* the court held that the disabled vessel upon which the plaintiff worked had been removed from navigation, and thus could not support a claim of unseaworthiness. Similarly, in *Cook* v. *Belden Concrete Products, Inc.* (5th Cir. 1973), 472 F.2d 999, *reh. den.* 472 F.2d 1405, *cert. den.* 414 U.S. 868, 94 S.Ct. 175, 38 L.Ed.2d 116, the stationary construction platform on which the plaintiff was injured was held to be indistinguishable from a floating drydock, and there was no other vessel to which the plaintiff could be attached as a seaman, because the plaintiff was working on an uncompleted barge when he was injured. (*See also Buna* v. *Pacific Far East Line, Inc.* (N.D.Cal. 1977), 441 F.Supp. 1360 (paint float upon which plaintiff worked not a vessel, plaintiff had no more or less permanent connection with vessel being painted)). Other cases in which the plaintiff worked on a permanently attached floating platform, but did not work on a vessel temporarily on that platform, are of no assistance to the defendants. (*Watkins* v. *Pentizien, Inc.* (5th Cir. 1981), 660 F.2d 604, *cert. den.* (1982), 456 U.S. 944, 102 S.Ct. 2010, 72 L.Ed.2d 467; *Leonard* v. *Exxon Corp.* (5th Cir. 1978), 581 F.2d 522, *reh. den.* 586 F.2d 842, *cert. den.* (1979), 441 U.S. 923, 99 S.Ct. 2032, 60 L.Ed.2d

397; *Blanchard* v. *Engine and Gas Compressor Services, Inc.* (5th Cir. 1978), 575 F.2d 1140; *Powers* v. *Bethlehem Steel Corp.* (1st Cir. 1973), 477 F.2d 643, *reh. den.* 483 F.2d 963, *cert. den.* 414 U.S. 856, 94 S.Ct. 160, 38 L.Ed.2d 106).

**[3]** More analogous to the facts at bar is *Mietla* v. *Warner Co.* (E.D.Pa.1975), 387 F.Supp. 937. In that case, the plaintiff was employed as a barge attendant, whose duties included keeping loaded barges free of water, checking the towing gear and looking for safety violations. He was assigned to maintain the barges which tied up to Pier 55 or to a permanent floating dock known as barge No. 4, both of which facilities the plaintiff conceded were not vessels. Nonetheless, the district court held that the plaintiff's status as a seaman was for the jury to decide, because the plaintiff could be considered to be a member of the crew of the barges which he tended. *Mietla* stands for the principle that a plaintiff who frequently works on a structure which is not a vessel is not precluded from being a seaman, if, in his employment he is assigned to vessels in navigation. In the present case, this means that, if the plaintiff met the three requirements of being a crew member of the R.W. Naye or the S-127 or a fleet which contained them, the fact that he repaired them while on a moored floating drydock does not deny him recovery under the Jones Act. These three requirements must now be examined in greater detail.

**[4]** (1) *Were the R.W. Naye and the barge S-127 "vessels in navigation?"* It is not contested that the motor vessel and the barge are, in fact, vessels. Nor does their presence in the drydock for repairs mean that they were not in navigation at the time of the plaintiff's injuries. (*Bodden* v. *Coordinated Caribbean Transport, Inc.* (5th Cir. 1966), 369 F.2d 273; *Keymon* v. *Tennessee Towing Co.* (6th Cir. 1961), 296 F.2d 785). The defendants do not represent the Naye and the S-127 as having been removed from service for a season or other substantial period of time (*Compare Garcia* v. *Universal Seafoods, Ltd.* (W.D.Wash. 1978), 459 F.Supp. 463; *Desper* v. *Starved Rock*

*Ferry Co.; Hawn* v. *American S.S. Co.* (2nd Cir. 1939), 107 F.2d 999 *with Sweeney* v. *American STeamship Co.* (6th Cir. 1974), 491 F.2d 1085) or as undergoing repairs of such a major character as to amount to a withdrawal from navigation (*Wixom* v. *Boland Marine and Manufacturing Co., Inc.* (5th Cir. 1980), 614 F.2d 956; *See also Delome* v. *Union Barge Line Co.* (5th Cir. 1971), 444 F.2d 225, *cert. den.* 404 U.S. 995, 92 S.Ct. 534, 30 L.Ed.2d 547). Therefore, the jury could properly determine that these vessels were in navigation when the plaintiff was injured.

**[5]** (2) *Was the plaintiff acting "primarily in aid of navigation" of those vessels at the time of his injuries?* In keeping with the remedial purposes of the Jones Act, the phrase "primarily in aid of navigation" has been construed far beyond its natural meaning to include such personnel as hairdressers (*Mahramas* v. *American Export Isbrandtsen Lines, Inc.* (2nd Cir. 1973), 475 F.2d 165) and waitresses (*Buford* v. *Cleveland and Buffalo Steamship Co.* (7th Cir. 1951), 192 F.2d 196), "as well as other persons not subject to being tattooed like ordinary seamen." (*Perez* v. *Marine Transport Lines, Inc.* (E.D.La. 1958), 160 F.Supp. 853, 855). All that is necessary is that the duties of the plaintiff must have contributed to the vessel's function or to the accomplishment of its mission. (*Baker* v. *Pacific Far East Lines, Inc.; Wilkes* v. *Mississippi River Sand and Gravel Co.* (6th Cir. 1953), 202 F.2d 383, *cert. den.* 346 U.S. 817, 74 S.Ct. 29, 98 L.Ed. 344).

**[6]** The defendants are correct that, in determining whether the plaintiff acted primarily in aid of navigation as a fitter, his assigned tasks as a deckhand on the Little Giant are not relevant. (*White* v. *Louisiana Menhaden Co., Inc.* (E.D.La. 1980), 498 F.Supp. 126). It is also well accepted that, although the throwing and securing of lines is normally a seaman's chore, a plaintiff who occasionally engages in that task is not necessarily a seaman. (*South Chicago Coal and Dock Co.* v. *Bassett* (1940), 309 U.S. 251, 60 S.Ct. 544, 84 L.Ed. 732; *Salgado* v. *M.J.*

*Rudolph Corp.* (2nd Cir. 1975), 514 F.2d 750; *Griffith* v. *Wheeling Pittsburgh Steel Corp.*) The significant question in the second portion of the "seaman" test is therefore whether the plaintiff, when performing the duties of a fitter, contributed to the function of the vessels which were in drydock or to the accomplishment of their mission.

Other decisions have held that plaintiffs employed in various repair capacities were primarily aiding in navigation. (*Porche* v. *Gulf Mississippi Marine Corp.* (E.D.La. 1975), 390 F.Supp. 624 (plaintiff welded pipe to be laid from barge); *Braniff* v. *Jackson Ave.—Gretna Ferry, Inc.* (5th Cir. 1960), 280 F.2d 523, *reh. den.* (1961), 289 F.2d 939 (plaintiff employed as master mechanic on ferries); *Lukos* v. *Chesapeake and Ohio Railway Co.* (W.D.Mich. 1954), 120 F.Supp. 296 (plaintiff assigned general cleaning and painting duties); *Rogosich* v. *Union Dry Dock and Repair Co.* (plaintiff was carpenter on floating drydock); *contra, Specht* v. *Pittsburgh Coal Co.* (W.D.Pa. 1975), 432 F.Supp. 717; *Chapman* v. *M/G Transport Services, Inc.* (W.D.Pa. 1977), 432 F.Supp. 723). The results reached in these cases comport with the broad reading which the courts have given to the phrase "in aid of navigation." In a strictly logical sense, the work performed by a shipfitter or similar repair worker is preparatory to, and is the first step towards rendering a vessel ready again for navigation or preventing it from being removed from navigation. It would be incongruous to hold that such a worker, who has a direct connection with making or keeping a vessel navigational, is not "primarily in aid of navigation" as a matter of law, while allowing the jury to determine that other seaside workers, whose connection with navigation is indirect at best, are seamen. The proper rule, derived from the authorities listed above, is that whether a plaintiff acted "primarily in aid of navigation" at the time of his injury is a jury question if the plaintiff was a repair or maintenance worker who was directly connected with keeping a vessel in navigation or preparing it to retain navigational capacity. As the plaintiff in this case met this criterion, resolution of

the second part of the "seamen" test was properly left to the jury.

(3) *Did the plaintiff have a "more or less permanent connection" with the R. W. Naye and the barge S-127 or with a specific group of fleet of vessels which contained them?* This issue is the heart of the defendants' challenge to the court's failure to direct a verdict in their favor. The plaintiff does not argue that he had any sort of permanent attachment to either the Naye or the S-127, individually, nor does this record present facts to support such a claim. Consequently, the issue posed by this branch of the "seaman" test is if a jury question is presented concerning whether the plaintiff was "more or less permanently connected" with a fleet containing the Naye and the S-127. The defendants contend that no such connection was established, as a matter of law, and point to several decisions which they claim are analogous to the facts at bar.

In *Baker* v. *Pacific Far East Lines, Inc.*, the plaintiff served as a replacement member of a shoregang, which was assigned to cleaning, maintenance, painting and other duties on the defendant's vessels. Although approximately 90% of the plaintiff's employment time was spent upon barges and other vessels, he "rarely spent more than several consecutive hours aboard any given vessel," (451 F.Supp. 84, 88), and could not identify which ships he cleaned or maintained on any given day, or even the ships upon which he was injured. The district court held that the plaintiff's connection with any group of vessels was insufficiently permanent to justify a finding that he was a seaman, at least in part because the defendant's fleet consisted of between 500 and 1000 barges. (*See also Buna* v. *Pacific Far East Line, Inc.*, in which the plaintiff, also employed by the same defendant as a shoregang worker, attested that his shoreside tasks included, *inter alia,* moving furniture in the defendant's office building, painting stripes in the defendant's parking lots and performing maintenance in the defendant's storerooms and office).

The plaintiffs or plaintiffs' decedents in *Bertrand* v. *International Mooring and Marine, Inc.* (W.D.La. 1981), 517 F.Supp. 342, worked as members of an anchor-handling and mooring crew, thereby performing classical mariner's work. They were injured in an auto accident in the course of their employment. As members of the anchor-handling and mooring crew, they spent between 90 and 100% of their work hours aboard vessels, readying them for their employer to use them to work on offshore drilling vessels. These men lived aboard the vessels for the duration of their assignments, but those assignments would range from several hours to about seven days, the average assignment lasting between four and five days. The court found that none of these workers had any sort of permanent connection with a specific group of vessels, and directed verdicts in their employer's favor. Yet, it was also noted in the opinion that the employer did not own any vessels, and even if an independent division of the defendant-employer did own five vessels, the evidence revealed that one of the men had worked on one of these vessels twice, while another had worked on one of them only once.

*Baker* and *Bertrand* are examples of two categories of decisions which are of little relevance to the facts at bar. The first of these consists of those cases in which the plaintiff was truly a "casual worker upon the water" (*South Chicago Coal and Dock Co.* v. *Bassett* (1940), 309 U.S. 251, 260, 60 S.Ct. 544, 549, 84 L.Ed. 732, 738), by virtue of the amount of time the plaintiff spent on land in the course of his employment, or the nature of his duties while ashore. (*Baker; Buna; White* v. *Louisiana Menhaden Co., Inc.* (plaintiff, normally employed on fishing vessel, was assigned to perform maintenance work at defendant's harbor facilities during four-month off season); *Fazio* v. *Lykes Bros. Steamship Co., Inc.* (5th Cir. 1978), 567 F.2d 301 (plaintiff, as member of shoregang, could work on no vessel at all on any particular day); *Rotolo* v. *Halliburton Co.* (5th Cir. 1963), 317 F.2d 9, *cert. den.* 375 U.S. 852, 84 S.Ct. 111, 11 L.Ed.2d 79 (plaintiff and similar employees spent

80-90% of work time as welders at base shop on land); *Thibodeaux* v. *J. Ray McDermott and Co.* (5th Cir. 1960), 276 F.2d 42 (plaintiff, as welder in defendant's fabricating division, customarily worked on vessels under construction, conversion or outfitting)). The second category of cases includes those in which the plaintiff had only a temporary connection with the vessel upon which he was injured, and in addition, could not identify a specific group of vessels to which he could claim permanent attachment. (*Bertrand; Guidry* v. *Continental Oil Co.* (5th Cir. 1981), 640 F.2d 523, *cert. den.* 454 U.S. 818, 102 S.Ct. 96, 70 L.Ed.2d 87; *Richardson* v. *Norfolk Shipbuilding and Drydock Corp.* (E.D. Va. 1979), 479 F.Supp. 259, *aff'd.* (4th Cir. 1980), 621 F.2d 633; *Lotzman* v. *Oxyness Shipping Co.* (1978), 93 Misc.2d 461, 402 N.Y.S.2d 964; *Ross* v. *Mobil Oil Corp.* (5th Cir. 1973), 474 F.2d 989, *cert. den.* 414 U.S. 1012, 94 S.Ct. 378, 38 L.Ed.2d 250; *Thomas* v. *Peterson Marine Service, Inc.* (5th Cir. 1969), 411 F.2d 592, *cert. den.* (1970), 396 U.S. 1006, 90 S.Ct. 562, 24 L.Ed.2d 499). Some cases are, of course, distinguishable from this one because they contain elements of both of these categories.

The defendants do not specifically contest the distinctions between the second group of decisions and the present case. However, they question whether the plaintiff can be considered as not "land-based." Instead of defining a shore based worker as one who spends a significant portion of his work time on land or who undertakes tasks traditionally performed on land while ashore, the defendants urge that a shore based worker is one "who is not exposed to the hazards of the sea." They note that in other cases in which maintenance workers were properly found to be more or less permanently connected with a fleet of vessels, those vessels were operational when the plaintiff worked on them, thereby exposing the workers to the hazards of the sea. (*Bazile* v. *Bisso Marine Co., Inc.* (5th Cir. 1979), 606 F.2d 101, *reh. den.* (1980), 613 F.2d314, *cert. den.* 449 U.S. 829, 101 S.Ct. 94, 66 L.Ed.2d 33; *Mietla* v. *Warner Co.; Braniff* v. *Jackson Ave.—Gretna Ferry, Inc.)* From this observation, the defen-

dants conclude that the plaintiff, who worked on vessels which were in and out of operation, and who spent much of his time working on a floating drydock, is a shore based worker as a matter of law.

[7] But, accepting defendants' suggestion that a maintenance worker must be assigned to work on operational vessels in order to satisfy the "permanency" requirement of the "seamen" test would be to read into that requirement a condition the case law does not explicitly mandate. It would also lead to the application of conflicting maxims under two different portions of the "seamen" test, inasmuch as a vessel in drydock for repairs is a vessel in navigation, even though, under the defendants' theory, a plaintiff who worked on a fleet containing that vessel could not be permanently attached to that fleet. Moreover, the amount of time a worker spends on land and the nature of his duties while ashore are more accurate indices of whether a worker is "land-based" than is the operational capacity of the ship he is on when he is injured. Under these criteria, it cannot be said that the plaintiff was "land-based" as a matter of law. Furthermore, the plaintiff did not do all of his work while on the drydock. He also repaired vessels afloat in the Mississippi, and was thus "exposed to the hazards of the sea," even if he was not when he was injured.

Other cases mentioned by the defendants to justify entry of directed verdicts in their favor are factually different from the present case, even if they do not fall easily into either of the categories of cases mentioned above. In *Specht* v. *Pittsburgh Coal Co.*, the plaintiff was injured while performing repair work from scaffolding alongside the M/V D.J. Johnson. The plaintiff did not claim to be permanently connected with the Johnson, which was not owned by his employer, but he did assert the existence of such a connection with the towboat M/V Elizabeth. However, in a depostion taken two years after the accident, the plaintiff admitted that he had not been aboard the M/V Elizabeth for the past three or four years. He also stated

that his employment included work in a ship on shore as well as assignments on board vessels. In *Chapman* v. *M/G Transport Services, Inc.*, decided by the same court which decided *Specht*, the plaintiff was employed by the defendant as a welder for only two weeks, and had he worked any longer, he would have had to join the United Steelworkers of America. While upon one of the defendant's barges at the end of that period, he was injured. The court found his connections with that vessel, as in *Specht*, to be temporary as a matter of law.

**[8]** A review of the facts in this case shows that the plaintiff, contrary to many of the claimants in the decisions analyzed above, spent all of his work time on board vessels, or on the floating drydock, and none of his time ashore. It is not contended that his duties entailed anything other than the repair of vessels or the securing of lines on the vessels to be repaired or on the floating drydock. While the plaintiff serviced vessels in addition to those owned by ACBL or its subsidiaries, the record does not indicate the frequency of such repairs, except for the statement of ACBL's vice-president and general counsel that La. Dock and Jeff Boat provided the bulk of service for ACBL and its barge companies. Moreover, the number of vessels in the fleet to which the plaintiff insists he was attached, which also "might have some bearing on a jury determination that he was or was not a seaman" (*Mietla* v. *Warner Co.* (E.D.Pa. 1975), 387 F.Supp. 937, 939; *see also Baker* v. *Pacific Far East Lines, Inc.*), is not apparent of record. Given this information, the permanency of the plaintiff's connection to an ACBL fleet is indeed a close issue, yet it cannot be said that there is no evidence from which reasonable jurors might draw conflicting inferences concerning that question. Even marginal claims under the Jones Act are properly left to the jury (*Smith* v. *Massman Construction Co.* (5th Cir. 1979), 607 F.2d 87, 89), and therefore, the nature of the plaintiff's connection with an ACBL fleet was correctly entrusted to their determination in this case. Because an analysis of the three elements of being a Jones Act seaman shows that the plaintiff did not fail to satisfy any of these

elements as a matter of law, the defendants were not entitled to directed verdicts in their favor.

The defendants' second assignment of error consists of a group of seven arguments pertaining to certain of the plaintiff's instructions which were given to the jury. These arguments will be addressed in the order presented in the defendants' brief.

(1) The defendants challenge the accuracy of plaintiff's instruction 19, which defines the term "vessel" as follows:

> The primary meaning of the term "vessel" is that of any watercraft or other contrivance used, or capable of being used, as a means of transportation on water.
>
> The term "vessel" also includes, however, various special purpose craft (such as barges) which do not operate as vehicles for transportation but rather serve as movable, floating bases for stationary operations. If a structure is buoyant and capable of being floated from one location to another it may be found to be a vessel even though it may have remained in one place for a long time and even though there are no plans to move it in the foreseeable future.

The defendants insist that this is an improper definition of a vessel because it does not require the jury to consider "the purpose for which the craft was constructed and the business in which it is engaged." (*Cook* v. *Belden Concrete Products, Inc.* (5th Cir. 1973), 472 F.2d 999, 1001, *cert. den.* 414 U.S. 868, 94 S.Ct. 175, 38 L.Ed.2d 116). They also view this instruction as allowing the jury to consider as a vessel anything that floats.

The plaintiff argues that these objections were not preserved for purposes of this appeal. He characterizes defendants' objection to this instruction as only general in nature and therefore insufficient to save for review the defects listed above. (*Gasbarra* v. *St. James Hospital* (1979), 85 Ill. App.3d 32, 40 Ill.Dec. 538, 406 N.E.2d 544; *Mathis* v. *Burlington Northern,*

*Inc.* (1978), 67 Ill.App.3d 1009, 24 Ill.Dec. 639, 385 N.E.2d 780; 87 Ill.2d R. 239(b)). At the instruction conference, defendants' counsel stated that he objected to plaintiff's instruction 19 because it did not properly state the law, and because the evidence did not show that the barge, drydock or the R.W. Naye fit plaintiff's definition. He also disagreed with the clause, "which do not operate as vehicles for transportation but rather serve as movable, floating bases for stationary operations."

**[9,10]** Whether these objections are specific enough to preserve the defendants' challenges to plaintiff's instruction 19, those challenges must be deemed waived for another reason. To save an objection to an instruction, it is incumbent upon a party to tender a proper instruction, otherwise that objection is waived. (*Saldana* v. *Wirtz Cartage Co.* (1978), 74 Ill.2d 379, 24 Ill.Dec. 523, 385 N.E.2d 664; *Department of Public Works and Buildings* v. *Klehm* (1973), 56 Ill.2d 121, 306 N.E.2d 1, *cert. den.* (1974), 417 U.S. 947, 94 S.Ct. 3072, 41 L.Ed.2d 667; 87 Ill.2d R. 366(b)(2)(i)). The record does not indicate that the defendants offered their own definition of a vessel, nor does their brief contain such a definitional instruction. Because a trial court has, in general, no duty to give instructions which were not requested by the parties (*Chicago Land Clearance Commission* v. *Darrow* (1957), 12 Ill.2d 365, 146 N.E.2d 1; *City of Chicago* v. *Baird* (1971), 132 Ill.App.2d 644, 270 N.E.2d 259, *aff'd* (1972), 52 Ill.2d 512, 288 N.E.2d 110), defendants' objections to plaintiff's instruction 19 have been waived.

(2) The defendants next maintain that plaintiff's instruction 21 inaccurately defined the term "member of a crew," which phrase is synonymous with the Jones Act requirement of being a seaman. That instruction read as follows:

> The proposition of whether the plaintiff was a member of a crew of a vessel at the time of the accident is a question of fact which you must determine, just as you determine all questions of fact in the case.

You may find that the plaintiff was a member of a crew of a vessel if you find: (a) that the plaintiff's employment related to a vessel having a specific function (or mission); and, (b) that the plaintiff had a part in the operations of the vessel, whether it be related to the vessel's transportation or to the performance of its function (or mission).

It is not essential that the plaintiff be assigned to any particular vessel. He may have duties which require him to serve on numerous vessels, and you may still find that he is a member of the crew of the particular vessel involved in this case.

One whose employment takes him on to a vessel may be found to be a member of the crew, even though his stay aboard is expected to last only for a very short period.

You may find that the defendant [sic] is a member of the crew of a vessel even though the vessel has not moved on the water at any time during the plaintiff's employment, and even though there are no plans to move it at any time in the foreseeable future.

There must, however, be more than an irregular connection between the plaintiff and some vessel in order that he may be found to be a member of the crew. If the plaintiff were a mere passenger being transported to a place of work which is not connected with a vessel he is not a member of the crew of the vessel in which he is being transported, even though his employer owned that vessel and was transporting the plaintiff for its own purposes.

At the instruction conference, defendants' counsel objected to the instruction as being an inaccurate statement of the law. He offered instead an instruction, defendants' number 12, which stated that "[a] person is a crewman if: (1) he is more or less permanently attached to a vessel or fleet of vessels; (2) the vessels are in navigation; and (3) his primary and natural duty is to

serve as an aid to navigation." Thus, contrary to the plaintiff's assertions, the defendants have preserved their objections to plaintiff's instruction 21.

A short explanation concerning the source of this instruction is necessary. Unlike the courts in this state, the Federal courts do not have a set of standardized instructions comparable to the Illinois Pattern Instructions. Nor, due to the relative infrequency of Jones Act cases in the courts of this State, do the Illinois pattern Instructions contain jury instructions on issues peculiar to the Jones Act. As a result, attorneys who try Jones Act cases must rely upon unofficial compilations of jury instructions, extracted by scholars from relevant cases. One of the most widely used of these sets is *Federal Jury Practice and Instructions,* 2d Ed.1970, (F.J.P.I.) by Edward Devitt and Charles Blackmar. Plaintiff's instruction 21 is a verbatim transcription of the definition of "member of a crew" found in Section 96.03 of F.J.P.I., even to the erroneous reference to "defendant" instead of "plaintiff" in the fourth paragraph.

**[11]** The defendants claim that plaintiff's instruction 21 does not require the jury to find that (1) the vessel upon which the plaintiff was employed was in navigation, and (2) that he had a more or less permanent connection with the vessel. They also argue that the last paragraph only requires the jury to find that the plaintiff was associated with some vessel for some time, instead of having a permanent connection with a vessel, unless they found him to be a passenger.

It has been stated that reliance on general compilations of jury instructions, such as F.J.P.I., is not without dangers, because no authors can have a comprehensive knowledge of all fields of law upon which juries may be instructed. (*Peymann* v. *Perini Corp.* (1st Cir. 1974), 507 F.2d 1318, 1324 n. 2, *cert. den.* (1975), 421 U.S. 914, 95 S.Ct. 1572, 43 L.Ed.2d 780). Difficulties may also be presented in the use of quotations from published opinions which were never intended to be quoted directly as jury instructions. (*Bernardo* v. *Bethlehem Steel Co.*

(2nd Cir. 1963), 314 F.2d 604, 609). However, the reported decisions show that plaintiff's instruction 21 does in fact contain an accurate statement of the law, and that it is defendants' instruction 12 which is misleading.

**[12]** As noted above, the phrases "in navigation" and "primarily in aid of navigation" have been construed beyond their natural or literal meanings. Thus, defendants' tendered instruction 12, which submits those words to the jury without defining them, would be unduly restrictive. It has been said that, in instructing a jury under the Jones Act, a court must disabuse the jurors of the notion that a seaman is necessarily "a man with a tattoo, who walks with a rolling gait, wears bell-bottom trousers and handles, reefs and steers the vessel." (*Marine Drilling Co.* v. *Autin* (5th Cir. 1966), 363 F.2d 579, 580). Defendants' instruction 12 fails to accomplish this task. (*Offshore Co.* v. *Robison*).

Instead, the phrase "primarily in aid of navigation" has been defined as requiring that the duties of the plaintiff must have contributed to the vessel's function or to the accomplishment of its mission. (*Baker* v. *Pacific Far East Lines, Inc.; Wilkes* v. *Mississippi River Sand and Gravel Co.)* Jury instructions which have been worded in accordance with that definition have been consistently approved by reviewing courts. (*Willis* v. *Titan Contractors Corp.* (Tex.App. 1981), 625 S.W.2d 69, *writ of error refused; Marine Drilling Co.* v. *Autin; Williamson* v. *Daspit Bros. Marine Divers, Inc.* (5th cir. 1964), 337 F.2d 337; *Tipton* v. *Socony Mobil Oil Co.* (5th Cir. 1963); 315 F.2d 660, *rev'd on other grounds,* 375 U.S. 34, 84 S.Ct. 1, 11 L.Ed.2d 4, *reh. den.* 375 U.S. 936, 84 S.Ct. 328, 11 L.Ed.2d 268). Also, the Committee on Pattern Jury Instructions of the Fifth Circuit's District Judges Association has incorporated this language into its recommended Jones Act instruction. (committee on Pattern Jury Instructions, Dist. Judges Assoc., Fifth Cir., *Pattern Jury Instructions (Civil Cases),* Federal Claims Instruction 7A—Jones Act—Unseaworthiness (1980) (hereafter,

Fifth Cir. Instruction 7A)). The defendants' objections to the second paragraph of plaintiff's instruction 21 are not well taken, for that paragraph adequately explains the requirement that the plaintiff have been aboard a vessel primarily to aid in navigation.

**[13,14]** Nor is this instruction's definition of the "permanent attachment" requirement reversible error. While it would have been preferable for the court to require the jury to find that the plaintiff was more or less permanently attached to a vessel or group of vessels or that he performed a substantial part of his work aboard that vessel or group of vessels, in those words (*Willis* v. *Titan Contractors Corp.; Marine Drilling Co.* v. *Autin; Williamson* v. *Daspit Bros. Marine Divers, Inc.; Tipton* v. *Socony Mobil Oil Co.;* Fifth Cir. Instruction 7A; *see also Arundel Corp.* v. Jasper (1959), 219 Md. 519, 150 A.2d 415) the phrase "more than an irregular connection with some vessel" is not improper language in a Jones Act instruction. (*Stafford* v. *Perini Corp.* (1st Cir. 1973), 475 F.2d 507, 510, 511). Additionally, the reference to a passenger being transported to a place of work does not dilute the requirement of the plaintiff's connection with a vessel, and appears to be mere surplusage under the facts of this case.

**[15]** (3) The defendants further argue that plaintiff's instructions 13 and 20B erroneously referred to the defendants as vessel owners or operators rather than employers, and contend that it is only the employer-employee relationship to which Jones Act liability may attach. However, at the instruction conference, defendants' counsel did not object to plaintiff's instruction 13 on the ground that it did not use the word "employer." Moreover, defendants' instruction 6A, which was offered as an alternative to plaintiff's instruction 20B, also referred to the defendants as "vessel owners." Consequently, the defendants will not be heard to complain of this language in these instructions.

**[16]** (4) It is also asserted that plaintiff's instruction 18A was defective in that it did not specify which vessel to which the plaintiff claimed permanent attachment. The record of the instruction conference does not reflect that this instruction was objected to because of that omission, and this argument has also been waived.

(5) The defendants claim that the first three paragraphs of plaintiff's instruction 17A duplicated plaintiff's instruction 16A in its entirety. This objection was not made at the instruction conference, and has therefore not been preserved for purposes of this appeal.

(6) The court gave plaintiff's instruction 12A, which is from Section 80.16 of F.J.P.I. It read as follows:

> Since a corporation can act only through its officers or employees, or other agents, the burden is on the plaintiff to establish, by a preponderance of the evidence in the case, that the negligence of one or more officers, or employees, or agents, of one or more of the defendants (other than the plaintiff) was a proximate cause of any injuries and consequent damages sustained by the plaintiff.
>
> Any negligent act or omission of an officer, or employee, or other agent, of a corporation, in the performance of his or her duties, is held in law to be the negligence of the corporation.

The defendants objected to this instruction, as they do in this court, because there is an adequate instruction in Illinois Pattern Instructions. (IPI). They offered as an alternative defendants' instruction 8, from IPI 50.11, which stated, "[t]he defendants are corporations and can act only through their officers and employees. Any act or omission of an officer or employee within the scope of his employment is the action or omission of the defendant corporations."

Supreme Court Rule 239(a) provides, in general, that whenever an Illinois Pattern Instruction contains an instruction applicable to the case, and the court determines that the jury should be instructed on that issue, "the IPI instruction shall be used, unless the court determines that it does not accurately state the law." (87 Ill.2d R. 239(a)). It is not suggested that IPI 50.11 was on a subject upon which the jury should not have been instructed, that it was inaccurate, or that F.J.P.I. 80.16 ws necessary to "amplify or clarify" IPI 50.11. (*Lay* v. *Knapp* (1981), 93 Ill.App.3d 855, 49 Ill. Dec. 272, 417 N.E.2d 1099). Therefore, IPI 50.11 should have been given. It should be noted that plaintiff's instruction 12, which was approved by the court before it was withdrawn by the plaintiff, was a modified form of IPI 50.11.

**[17]** However, a violation of Supreme Court Rule 239(a) is not automatically reversible error. (*Law* v. *Central Illinois Public Service Co.* (1980), 86 Ill.App.3d 701, 41 Ill.Dec. 728, 408 N.E.2d 74; *Hitt* v. *Langel* (1968), 93 Ill.App.2d 386, 236 N.E.2d 118). The defendants do not contend that F.J.P.I. 80.16 is partial, misleading or argumentative. (*Seibert* v. *Grana* (1968), 102 Ill.App.2d 283, 243 N.E.2d 538). In fact, both F.J.P.I. 80.16 and IPI 50.11 present the identical proposition of law that a corporation is responsible for the acts of its employees undertaken within the scope of their employment, even if that proposition is discussed in slightly different language. The only significant distinction between the two instructions is that F.J.P.I. 80.16 refers specifically to the negligence of the employees of a corporation, while IPI 50.11 refers in more general terms to "any act or omission" of those employees. It is difficult to envision any prejudice which could have accrued to the defendants from the erroneous giving of plaintiff's instruction 12A.

(7) The defendnats' final instructional issue is somewhat difficult to understand. They argue that the court erred in giving "instructions nos. 9 and 10," but the instructions reproduced in

their brief as objectionable are plaintiff's instruction 9 and defendants' instruction 10. Yet, even if it is assumed that it is plaintiff's instruction 9 and 10 with which defendants take issue, it is also unclear what instruction they supposedly tendered as an alternative. They contend that they "offered an adequate instruction on the matter, IPI 3.01," but IPI 3.01 is on the impeachment of a witness by prior inconsistent statement or conduct, which was not an issue in this case, and the instruction reproduced in the brief as IPI 3.01 is actually the first sentence of plaintiff's instruction 10, which is IPI 15.01.

**[18]** The defendants insist that the instructions 9 and 10 (presumably plaintiff's instructions 9 and 10, being IPI 12.04 and 15.01) "were submitted to the jury though there was no evidence that implied that a third party, not as [sic] party to the suit, was to blame for the injury to the plaintiff." However, even though it has been held that this combination of instructions should not be given unless there is some evidence that something other than the negligence of the defendant proximately caused the plaintiff's injuries (Notes on use to IPI 12.04 and 15.01; *Perry* v. *Chicago and North Western Transportation Co.* (1977), 54 Ill.App.3d 82, 11 Ill.Dec. 701, 369 N.E.2d 155), this does not appear to have been the position taken by defendants' counsel in objecting to plaintiff's instruction 9 at trial. He averred that "there is evidence in the case that the vessels involved were not owned by American Commercial Barge Lines, that it [sic] was owned by others; that the condition of the vessel itself might have been the proximate cause of the alleged injury to the plaintiff, and that the jury could so find." This statement is an accurate assessment of some of the evidence presented at trial, especially the testimony of ACBL's parent company, American Commercial Lines, Inc., which was not a party to the suit. Under the relatively ambiguous status of the ownership of the vessels involved, no error was committed in the giving of these instructions.

[19] The defendants' last assignment of error is that the court should have declared a mistrial during plaintiff's examination of Michael Sheehan, ACBL's manager of training and safety. In their brief, defendants contend that plaintiff's counsel "exhibited hostile tone" toward that witness and defense counsel, "made other improper remarks" directed toward defense counsel, and also "engaged in improper questioning and improper courtroom behavior." They do not specify the remarks and questions characterized as improper, but merely list several pages of the record. Their post-trial motion was even less specific, contending only that "the court erred in allowing plaintiff's counsel to ask unreasonably argumentative questions and to engage in other prejudical conduct by way of his own statements and comments during the testimony of Michael Sheehan." While it may be questionable whether defendants' allegations are specific enough to preserve this alleged error for purposes of this appeal, a review of the pages of the record on which defendants find objectionable material fails to reveal grounds for reversal.

For the reasons presented above, the judgment of the circuit court of Madison County is affirmed in its entirety.

AFFIRMED.

WHITE, J., concurs.[1]

KASSERMAN, Judge, dissenting:

It is my opinion that the trial court erred in giving plaintiff's Instruction No. 21; therefore, I must respectfully dissent.

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[1] Justice White was assigned to the panel on rehearing in place of Justice Scholz who retired from the bench on Dec. 6, 1982.

The majority in its opinion recognizes that it is essential to a proper determination of the question of whether plaintiff was entitled to maintain this action under the Jones Act that the jury be accurately instructed as to the proper definition of the words "seaman" and "member of the crew." It is my opinion that plaintiff's Instruction No. 21 fails in this respect; therefore, the giving of such instruction constituted reversible error.

The authority cited as authorizing plaintiff's Instruction No. 21 was *Federal Jury Practice and Instructions,* a publication authored by Devitt & Blackmar (Section 96.-03); however, an examination of this publication indicates that it is a compilation of statements made in various cases in the federal courts, *Slatton* v. *Martin K. Eby Construction Co., Inc.* (8th Cir. 1974), 506 F.2d 505; *Braniff* v. *Jackson Ave.-Gretna Ferry, Inc.* (5th Cir. 1960), 280 F.2d 523; *Stanley* v. *Guy Scroggins Construction Co.* (5th Cir. 1961), 297 F.2d 374; *Senko* v. *La Crosse Dredging Corp.* (1957), 352 U.S. 370, 77 S.Ct. 415, 1 L.Ed.2d 404; and *Texas Co.* v. *Savoie* (5th Cir. 1957), 240 F.2d 674. It is noteworthy that none of the quoted statements were given in the process of instructing the jury but were statements of law recited in the courts' decisions. While the quoted portions of the various statements were proper statements of the law, they do not purport to be the basis for an instruction. Further, not all of the elements contained in plaintiff's Instruction No. 21 are based on direct quotes from these cases.

The perils resulting from a court relying on compilations such as *Federal Jury Practice and Instructions* are best stated in *Peymann* v. *Perini Corp.* (1st Cir. 1974), 507 F.2d 1318, in which the court in a footnote stated:

> "We have frequently expressed our apprehensions with respect to general compilations of jury instructions. *See, e.g., McMillen* v. *United States,* Cir., 1967, 386 F.2d 29, at 32. They are dangerous because no authors, however erudite, can have a comprehensive substantive background

> in all fields. In § 93.05 of Devitt & Blackmar there is a suggested special interrogatory, supposedly, (but, on investigation not), supported by authority, that would be jettisoned by any admiralty lawyer. * * *'' 507 F.2d 1318, 1324 n. 2.

Defendant's Instruction No. 12, which was refused by the court, stated:

> "A person is a crewman if: (1) he is more or less permanently attached to a vessel or fleet of vessels; (2) the vessels are in navigation; and (3) his primary and natural duty is to serve as an aid to navigation."

Defendant's authority for such instruction was *Richardson* v. *Norfolk Shipbuilding and Drydock Corp.* (1979), 479 F.Supp. 259, a United States District Court decision based on the decisions in *Whittington* v. *Sewer Construction Co.* (4th Cir. 1976), 541 F.2d 427 and *South Chicago Coal and Dock Co.* v. *Bassett* (1940), 309 U.S. 251, 60 S.Ct. 544, 84 L.Ed. 732.

In *Ardoin* v. *J. Ray McDermott and Co.* (5th Cir. 1981), 641 F.2d 277, the Circuit Court of Appeals for the Fifth Circuit addressed this issue and stated:

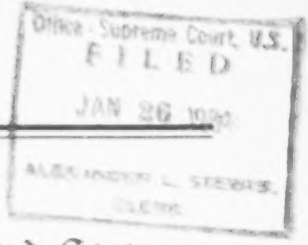
> "In *McKie* v. *Diamond Marine Co.*, 204 F.2d 132 (5th Cir. 1953), we set forth a definition of the phrase 'member of the crew' which, although restated and refined since, still articulates the basic compass of the term 'seaman' as used in the Jones Act. [The *McKie* court stated:]
>
> > 'The essential and decisive elements of the definition of a "Member of a crew" are that the ship be in navigation; that there be a more or less permanent connection with the ship; and that the worker be aboard primarily to aid in navigation.'
>
> 204 F.2d at 136. This definition has been our guide as we have attempted to resolve numerous riddles concerning the

> status of various types of ambiguous-amphibious workers involved in the offshore petroleum industry. *See Offshore Co.* v. *Robison,* 266 F.2d 769 (5th Cir. 1959) ('When is a roughneck a seaman?). In this case the riddle is revived in the form of the question 'When is a structural welder a seaman?' " 641 F.2d 277, 280.

It is my conclusion that plaintiff's Instruction No. 21 fails to set forth the requirement that the ship be in navigation and fails to fully set forth the essential elements of "seaman" as set forth in *Ardoin.* Further, it accentuates matters which are not relevant to the instant case. Therefore, I am of the opinion that plaintiff's Instruction No. 21 should have been refused by the trial court and defendants' Instruction No. 12 should have been given.

For the foregoing reasons, I would reverse the judgment of the trial court and remand for new trial.

83-1103




No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

PATRICK H. BERRY,
*Plaintiff-Respondent,*

VS.

AMERICAN COMMERCIAL BARGE LINES, a corporation, JEFF BOAT, INC. and LOUISIANA DOCK BOAT COMPANY, INC.
*Defendants-Petitioners.*

Petition For Writ Of Certiorari To The Appellate Court For The Fifth Judicial District of Illinois

## RESPONDENT'S BRIEF IN OPPOSITION

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## TABLE OF CONTENTS


| | Page |
|---|---|
| Table of Authorities | i |
| Statement of the Case | 1 |
| Reasons for Denying the Petition for Writ of Certiorari. | 4 |
| Conclusion | 9 |


## TABLE OF AUTHORITIES


| | |
|---|---|
| Bertrand v. International Mooring and Marine Co., Inc., et al., 700 F.2d 240 | 6 |
| Braniff v. Jackson Ave. - Gretna Ferry, Inc., 280 F.2d 523 | 5,6 |
| Carumbo v. Cape Cod S. S. Co., 1 Cirl, 1941, 123 F.2d 991, 995 | 5 |
| McDermott, Inc. v. Boudreaux, 679 F.2d 452 (1982) | 7 |
| Offshore Company v. Robinson, 266 F.2d 769, 75 ALR 2d 1296 | 5 |
| Senko v. Lacrosse Dredging Corp., 352 U.S. 370, 1 L.Ed.2d 404, 77 S.Ct. 415 | 4 |
| South Chicago Coal & Dock Co. v. Bassett, 1940, 309 U.S. 251, 60 S.Ct. 544, 84 L.Ed. 732 | 4 |
| Voris v. Eikel, 346 U.S. 328, 333, 74 S.Ct. 88, 91, 98 L.Ed. 5 (1953) | 7 |

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Petition For Writ Of Certiorari To The
Appellate Court For The Fifth Judicial District of Illinois

## RESPONDENT'S BRIEF IN OPPOSITION

### STATEMENT OF THE CASE

The petitioner's argument that respondent is not a member of a crew of a vessel as a matter of law is based upon it's erroneous statement that plaintiff was a land-based worker whose work was confined to repairing vessels in drydock. This erroneous statement is refuted by the following language in the appellate court opinion: "Furthermore, the plaintiff did not do all of his work while in the drydock. He also repaired vessels afloat in the mississippi, and was thus 'exposed to the hazards of the sea' even if he was not when he was injured. A review of the facts in this case shows that plaintiff, contrary to many of the claimants in the decisions analyzed above, spent all of his time on board

vessels, as on the floating drydock and none of his time ashore." (*Berry* v. *American Commercial Barge*, 450 N.E.2d, page 9 & 10)

The record is replete with evidence that plaintiff's duties were not confined to working on the floating drydock.

The ACBL operated a fleet of vessels on the Mississippi River for commercial purposes. It also operated a marine facility which included a large floating drydock for the purpose of keeping its fleet of vessels in navigation up and down the river. When a ship would become damaged so that it had no power it would be towed into the marine facility to be repaired in the river. Those ships that were damaged below the water line were floated into the drydock for repairs. Those that were damaged above the water line were repaired while they were afloat in the river.

Plaintiff worked both on the drydock repairing boats and also did a great part of his work on those vessels that were damaged above the water line and could be repaired while they were afloat.

> Question: About how many times would you have worked on the water - - - I guess above water level repairs?
>
> Answer: Well it would be every day according to what I was working at and what I had to do on a barge. I'd stay on a barge until it was done and they didn't need a fitter no more. (C121)
>
> Question: You would actually work on barges that were going back out on the water?
>
> Answer: They were already in the water. The only ones that wouldn't be in the water would be in the drydock. The rest would be tied off or have damage and would be above the water line and we'd repair it there. They wouldn't have to put it in the drydock. (C118-119)

Plaintiff used lines and wires on vessels everyday. This was true whether he was working on dock vessels or other vessels (R 334-335). When he got to work he was on vessels all of the time (R. 338). All employees on the drydock would use lines everyday (R.38-41).

The safety rules (Plaintiff's Exhibit 43) Promulgated by the petitioner, in pertinent part, provided:

10. *ALL* DECK *OPENINGS SHALL BE GUARDED.*

11. *A PORTABLE LIFE RING MUST* BE TAKEN TO WORK AREAS WHEN EMPLOYEES WILL BE WORKING ABOARD ANY *VESSEL AFLOAT — EXCEPT* WHEN A LIFE RING IS EASILY *VISIBLE AND READILY* ACCESSIBLE.

12. *LIFE JACKETS MUST* BE WORN ON ALL WORK FLATS, HARBOR BOATS, BARGES AFLOAT, AND ALL OTHER AREAS *NOT PROTECTED BY GUARD RAILS.* (Plaintiff's Exhibit 43)

## REASONS FOR DENYING THE WRIT

I.

The Appellate Court for the Fifth Judicial District of Illinois decided this case in accordance with the decisions of this court and of the Federal Appellate Courts which have considered the question presented by this appeal. The Appellate Court held and petitioners agree that for Jones Act purposes one can be a member of a crew of a vessel if he has a more or less permanent connection with a vessel or a specific group of vessels or performs a substantial part of his work aboard a vessel or a group of vessels.

The Jones Act (46 USC §688) provides that "any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action, all statutes of the United States modifying or extending the common law right on remedy in cases of personal injury to railway employees shall apply."

In *South Chicago Coal & Dock Co.* v. *Bassett,* 1940, 309 US 251, 60 S Ct 544, 84 L ed 732, the United States Supreme Court held that there was sufficient evidence to support a finding of the commissioners that the petitioner was under the coverage of the Longshoremen's Act.

In *Senko* v. *Lacrosse Dredging Corp.,* 352 U.S. 370, 1 L ed 2d 404, 77 S Ct 415, the U.S. Supreme Court reversed an Illinois Appellate Court decision (66 Ill.App. 2d 307, 129 N.E.2d 454) which held that there was insufficient evidence to support the jury's findings that Senko was a crew member. The U.S. Supreme Court stated: "As we have said before, this Court does not normally sit to re-examine a finding of the type that was made below. We believe, however, that our decision in *Chicago Co.* v. *Bassett* (US) *supra,* has not been fully understood. Our holding there that the determination of whether an injured per-

son was a 'member of a crew' is to be left to the finder of fact meant that juries have the same discretion they have in finding negligence or any other fact. The essence of this discretion is that a jury's decision is final if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate." (1 L ed 2d 404, 408)

Since the "Senko" holding, both the federal and state courts have held that almost all disputed questions concerning the status of injured persons claiming under the Jones Act were questions of fact for the jury. The landmark decision on the relationship between the trier of fact on the issue of the status within the meaning of the Jones Act is *Offshore Company* v. *Robinson,* 266 F 2d, 769, 75 ALR 2d 1296. This case was decided by the United States Court of Appeals for the Fifth District and has effectively implemented the "Senko" case. Concerning the relationship between the Longshoremen's Act and the Jones Act, the court stated:

> "The process of liberal construction of the Jones Act cannot now be ignored because Congress has seen fit to pass the Longshoremen's Act. As a result of the cases, we feel constrained to hold that one who does any sort of work aboard a ship in navigation is a 'seaman' within the meaning of the Jones Act.' *Carumbo* v. *Cape Cod S.S. Co.,* 1 Cirl, 1941, 123 F2d 991, 995. In that case the court pointed out that even a cook or an engineer is aiding in navigation." Whatever may have been the original intention of Congress, courts have given an extremely liberal interpretation to the terms 'seaman' and 'member of a crew of any vessel' without provoking any congressional amendments restricting the coverage of the act." 266 F2d 769, ALR2d 1296 at page 1304.' "

The facts in *Braniff* v. *Jackson Ave. - Gretna Ferry, Inc.,* 280 F2d 523, are very close to the facts in this case. In *Braniff* a superintendent in charge of maintenance of ferries, Braniff, and

his shore gang employee, Brown, were killed when the work boat in which they were engaged in making repairs on machinery on the ferry overturned. The district court entered a summary judgment in favor of defendants. In reversing the district court, the Court of Appeals held that the issue of whether the decedents were seamen within the meaning of the Jones Act was an issue for the trier of fact. Braniff was in charge of a six man "shore gang". The shore gang took orders from Braniff. It was the general practice of Braniff and the "shore gang" to report to the waterfront each morning. Braniff would then board each of the ferries to ascertain what repairs were necessary. Braniff was not assigned to nor did he stand watch aboard any of the ferries. He as well as the decedent, Brown, and other members of the shore gang, lived ashore and worked ordinary working hours.

The court said:

> "A company pilot in the regular employ of a concern operating an identifiable fleet of vessels who customarily and regularly boards every one of several specified vessels to dock and undock them would certainly satisfy the requirement that his duties contribute to the functioning of the vessel and to the accomplishment of its mission. If working regularly on all of them performing a substantial part of his work on each, the other element would likewise be satisfied. A declaration that such a person was a seaman with respect to injuries received on any one of them would afford "no reason for lamentations." 266 F 2d 769, 780. No more so should there be for an engineer performing like regular services of immediate, direct, critical importance to the operation of the ferries as ferries." *Braniff* v. *Jackson Ave. - Gretna Ferry, Inc.*, 280 F 2d 523 at page 529. (Page 6-9 of Answer to Petition for Leave to Appeal).

In *Bertrand* v. *International Mooring and Marine Co., Inc., et al* 700 F 2d 240, the trial court granted summary judgment in

favor of the defendant on the grounds that plaintiffs were not, as a matter of law, members of the crew of a fleet of vessels. The Appellate Court held that although the facts were undisputed, conflicting inferences could be drawn from them and that, therefore, it was error for the trial court to grant summary judgment in favor of the defendant.

The court also held that the fact that claimants work placed him on several different vessels did not preclude seaman status for Jones Act purposes even though his employer did not own or control several vessels upon which the plaintiff worked.

Finally, the court held that there was an evidentiary basis for the plaintiff to establish that he was a member of a crew of a vessel or group of vessels if he performed a substantial part of his work aboard the vessel or vessels or by proving that he was permanently assigned to the vessel or vessels. The record reflects that the plaintiff was permanently assigned to the fleet of vessels operated by petitioner and also performed a substantial part of his work on them so he satisfies either test.

Petitioners contend that plaintiff could not be covered under the Jones Act (46 USC 688) since he was covered under the Longshoremen's and Harbor Worker's Act (33 USC 903) and that the Longshoremen's Act was his exclusive remedy. This argument leaves no place for a fact finder to find facts or to draw inferences as to those covered under either of the foregoing acts and is in direct conflict with the decisions of this court and other federal courts. The best illustration of the fallacious argument of petitioner is illustrated by the following language from the recent case of *McDermott, Inc.* v. *Boudreaux,* 679 F.2d 452 (1982):

> "In excluding Boudreaux from coverage, we wish to emphasize our recognition that the Longshoremen's Act, like the Jones Act, requires a liberal interpretation in favor of claimants to effect its purposes. See, e.g., *Voris* v. *Eikel,* 346 U.S. 328, 333, 74 S.Ct. 88, 91, 98 L.Ed. 5 (1953). We

do not lightly exclude workers from coverage as a matter of law under either statute. Thus, despite our contined insistence that a Jones Act "seaman" and a "crew member" excluded from the Longshoremen's Act are one and the same (in other words, that the statutes are mutually exclusive) we realize that, in a practical sense, a "zone of uncertainty" inevitably connects the two Acts. Confronted by conflicting evidence concerning a worker's duties or undisputed evidence concerning an occupation that exhibits the characteristics of both traditional land and sea duties, a factfinder might be able to draw reasonable inferences to justify coverage under either statute."

II

With reference to petitioners argument that the trial court erred in giving plaintiff instruction no. 21, this contention was not presented to the Supreme Court of Illinois in petitioner's Petition for Leave to Appeal to that court. The contention was made in the Appellate Court and adequately answered in the Appellate Court opinion. Furthermore, the same type of instruction was approved in Marine Drilling Company v. Autin, 369 F 2d 579.

## CONCLUSION

For the foregoing reasons the Petition for Certiorari should be denied.

Respectfully submitted,

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